

AMENDED IN ASSEMBLY APRIL 10, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 1438

**Introduced by Assembly Member Longville
(Coauthor: Assembly Member Dymally)**

February 21, 2003

An act to add Section ~~1542.5~~ 1536.5 to the Penal Code, relating to business records.

LEGISLATIVE COUNSEL'S DIGEST

AB 1438, as amended, Longville. Seizure of business records.

Existing law authorizes the seizure of business records by a governmental agency pursuant to a search warrant supported by probable cause to believe that the records constitute evidence of the commission of a crime. The court is authorized to order the seized property, including business records, returned upon a motion made on specified grounds, including the grounds that the property taken is not the same as that described in the warrant, the warrant was not supported by probable cause, the warrant or its execution violated state or federal constitutional standards, or the property has not been offered or will not be offered as evidence against the defendant.

This bill would provide a procedure for an entity whose business records have been seized by a government agency, to demand that agency provide to it, within a 72-hour period, copies of the business records or access to the original records so that the entity can make copies of the records. The demand for the records would have to be supported by a declaration, under penalty of perjury that denial of access to the records or copies of the records would ~~cause the entity to~~

~~suffer significant injury or financial hardship~~ *either unduly interfere with the entity's ability to conduct its regular course of business or obstruct the entity from fulfilling an affirmative obligation that it has under the law.* The government agency would be authorized to refuse to produce copies of the records or deny access to the records on the grounds that possession of the records by the entity would pose a significant risk ~~to public safety of ongoing criminal activity.~~ By increasing the duties of local officials, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section ~~1542.5~~ 1536.5 is added to the Penal
 2 Code, to read:
 3 ~~1542.5.—~~
 4 1536.5. (a) If a government agency seizes business records
 5 from an entity, the entity may file a demand *on that government*
 6 *agency* to produce copies of the business records that have been
 7 seized. The demand for production of copies of business records
 8 shall be supported by a declaration, made under penalty of perjury,
 9 that denial of access to the records in question will ~~cause the entity~~
 10 ~~to suffer significant injury or financial hardship.~~ *either unduly*
 11 *interfere with the entity's ability to conduct its regular course of*
 12 *business or obstruct the entity from fulfilling an affirmative*
 13 *obligation that it has under the law.*
 14 (b) (1) Except as provided in paragraph (2), when a
 15 government agency seizes business records from an entity and

1 ~~receives~~ *is subsequently served with* a demand for copies of those
2 business records pursuant to subdivision (a), the government
3 agency in possession of those records shall make copies of those
4 records available to the entity within 72 hours of the ~~filing~~ *service*
5 of the demand to produce copies of the records.

6 (2) In the alternative, the agency in possession of the original
7 records, may in its discretion, make the original records
8 reasonably available to the entity within 72 hours of the filing of
9 the demand for the records, and allow the entity reasonable time
10 to copy the records.

11 (3) No agency shall be required to make records available at
12 times other than normal business hours, except where the agency's
13 normal business hours ~~make it impossible for the entity to obtain~~
14 ~~the required copies within five business days following the~~
15 ~~demand to produce the records.~~ *would delay production of the*
16 *required copies beyond five business days following the demand to*
17 *produce records.*

18 (4) If data is recorded in a tangible medium, copies of the data
19 may be provided in that same medium, or any other medium of
20 which the entity may make reasonable use. If the data is stored
21 electronically, electromagnetically, or photo-optically, the entity
22 may obtain either a copy made by the same process in which the
23 data is stored, or in the alternative, and at the entity's sole
24 discretion, by any other tangible medium through which the entity
25 may make reasonable use of the data.

26 (5) A government agency granting the entity access to the
27 original records for the purpose of making copies of the records,
28 may take reasonable steps to insure the integrity and chain of
29 custody of the business records.

30 (6) If the seized records are too voluminous to be copied in the
31 time period required by subdivision (a), the government agency
32 that seized the records may file a written motion with the court for
33 additional time to make the copies. This motion shall be made
34 within 72 hours of the ~~filing~~ *service* of the demand for the records.
35 An extension of time under this paragraph shall not be granted
36 unless the agency establishes that producing copies of the records
37 within the 72-hour time period, would create a ~~severe financial~~
38 ~~hardship on the agency.~~ If the court grants the motion, it shall make
39 an order designating a timeframe for the duplication and return of

1 the business records, deferring to the entity the priority of the
2 records to be duplicated and returned first.

3 (c) A government agency may refuse to produce copies of the
4 business records or to grant access to the original records under the
5 following circumstances:

6 (1) If the requirements of subdivision (a) are not met, the
7 government agency shall prove by ~~clear and convincing a~~
8 *preponderance of the evidence* that denial of access to the business
9 records or copies of the business records will not ~~cause the entity~~
10 ~~to suffer significant injury or financial hardship.~~ *unduly interfere*
11 *with the entity's ability to conduct its regular course of business or*
12 *obstruct the entity from fulfilling an affirmative obligation that it*
13 *has under the law.*

14 (2) If possession of the business records by the entity will pose
15 a significant risk of ~~harm to the public safety~~ *ongoing criminal*
16 *activity*, the government agency may file a motion with the court
17 requesting an order denying the entity access to the records. A
18 motion under this paragraph shall be in writing, and filed and
19 served upon the entity prior to the expiration of the 72-hour return
20 period required in subdivision (a).

21 (A) A hearing on the motion under this paragraph shall be held
22 within two court days of the filing of the motion, except upon
23 agreement of the parties.

24 (B) The government agency shall have the burden of proving
25 by clear and convincing proof that denial of access to the business
26 records is necessary to protect the public safety.

27 (d) The costs of producing copies of business records under this
28 section shall be borne by the entity requesting copies of the
29 records. A government agency may charge the entity only for the
30 actual costs of copying and producing the business records.

31 (e) For purposes of this section, the following terms are defined
32 as follows:

33 (1) "Seize" means obtaining actual possession of any property
34 alleged by the entity to contain business records.

35 (2) "Business records" include, but are not limited to: mailing
36 lists, client lists, accounts payable or receivable lists, tax records,
37 graphic images or any other accumulation of data, stored in any
38 tangible or electronic medium which is used primarily during the
39 *regular course of business* by the entity.

1 ~~(3) “Significant injury or financial hardship” means any loss~~
2 ~~of business that jeopardizes the continuation of the business, or~~
3 ~~reduces by more than 5 percent the profitability of the business.~~

4 SEC. 2. Notwithstanding Section 17610 of the Government
5 Code, if the Commission on State Mandates determines that this
6 act contains costs mandated by the state, reimbursement to local
7 agencies and school districts for those costs shall be made pursuant
8 to Part 7 (commencing with Section 17500) of Division 4 of Title
9 2 of the Government Code. If the statewide cost of the claim for
10 reimbursement does not exceed one million dollars (\$1,000,000),
11 reimbursement shall be made from the State Mandates Claims
12 Fund.

